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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

IN RE: Bard IVC Filters Products
Liability Litigation

No. 2:15-MD-02641-DGC

LISA HYDE and MARK HYDE, a
married couple, ,

Plaintiff,

v.

C.R. BARD, INC., a New Jersey
corporation and BARD PERIPHERAL
VASCULAR, an Arizona corporation,

Defendants.

**NOTICE OF LODGING PROPOSED
CHANGES TO JONES JUROR
QUESTIONNAIRE FOR *HYDE V. BARD***

(Assigned to the Honorable David G.
Campbell)

Pursuant to the Court's order dated July 13, 2018 (Doc. 11871), the parties submit their proposed modifications to the *Jones* juror questionnaire for the *Hyde v. Bard* bellwether trial. The proposed changes are shown in the attached Track Changes version of the Court's questionnaire in *Jones*. The Parties are unable to agree on the following four modifications and those portions are highlighted in yellow on the proposed juror questionnaire:

1 1) Brief Statement of the Case (The Parties have each submitted a proposed
2 statement for the Court's consideration)

3 **Plaintiffs' Position:**

4 Defendants seek to impose uncertainty at this late stage of the bellwether process
5 regarding the identification of which filter Ms. Hyde received. Defendants selected the
6 *Hyde* case for the bellwether process stating it was a G2X case. *See*, Defendants'
7 Submission Regarding Selection Of Cases For Bellwether Group 1. (Doc. 5652, April 24,
8 2017.) Defendants stated unequivocally that their case selections "are representative
9 cases, individually and as a group." They further represented to the Court that "Ms. Hyde
10 had a G2X implanted on 2/25/11. Ms. Hyde's case is representative as it involves a filter
11 fracture (25% of the pool) and involves multiple complications in a single case..."

12 Defendants' representations to the Court regarding the product Ms. Hyde received
13 were neither uninformed nor made in a vacuum without sufficient discovery. Defendants
14 deposed Mrs. Hyde's explanting physician on March 23, 2017, the sales representative on
15 March 27, 2017, and her implanting physician on April 6, 2017, all before making its
16 Group 1 bellwether submission on April 24, 2017 representing to the Court that *Hyde* was,
17 in fact, a G2X case. Defendants state below that they noted the alleged question of fact in
18 their motion for summary judgment, yet have provided no evidence that Ms. Hyde's filter
19 was an Eclipse. Moreover, the motion was filed four months after Defendants made their
20 representations to the Court in their Bellwether submission with the benefit of the relevant
21 medical records and depositions that clearly support Ms. Hyde received a G2X filter as
22 Defendants represented. Plaintiffs' position is that Bard has waived its opportunities to
23 challenge the identification of the filter it stated was a G2X.

24 **Defendants' Position:**

25 There is a question of fact in the *Hyde* case as to whether Ms. Hyde received a
26 G2X or Eclipse Filter. Because there is no lot number for the IVC filter implanted in Ms.
27 Hyde and the filter was discarded after it was retrieved, there is no way to definitely
28 identify the model of Ms. Hyde's IVC filter. At the time of the bellwether selection in

1 April 2017, it appeared based on statements in the medical records, that the filter was a G2
 2 filter. During subsequent discovery, defendants discovered, based on sales records to the
 3 hospital where the filter was implanted and long after its bellwether submission in April
 4 2017, that the plaintiff's filter is most likely an Eclipse in August 2017 and supplemented
 5 responses to the plaintiffs' requests for admission on August 21, 2017 to reflect this
 6 determination. *See* Defendants' supplemental response to request for admission no. 1,
 7 relevant portions attached as Exhibit A. Defendants also noted this issue and Bard's
 8 position in its motion for partial summary judgment (doc. 7359, n.2) and the plaintiffs
 9 responded to the defendants' assertions in their opposition motion (doc. 7952, n.1).
 10 Because it is a question of fact for the ultimately selected jury to decide whether Ms.
 11 Hyde's filter was a G2X or Eclipse, it is inappropriate to state one model or the other in
 12 the jury questionnaire's statement of the case and the filter should be referred to
 13 generically as a "Bard Filter."

14 2) Plaintiffs' Proposed Addition of Question No. 2

15 **Plaintiffs' Position:**

16 Plaintiffs submit that the proposed question will allow parties to assess whether the
 17 prospective juror harbors bias or prejudgment against either party based on the Brief
 18 Statement of the Case. The question does not precondition jurors to a particular result that
 19 favors either party. It is a neutral question placed relatively close to the Brief Statement
 20 of Facts which can be answered while the facts are fresh in the mind of the prospective
 21 juror.

22 **Defendants' Position:**

23 Defendants objects to this addition and submit that Question No. 2 is vague (with
 24 language like "is there anything"), and more important, the question is repetitive of
 25 Question No. 66 (which more broadly asks for any reason why a potential juror cannot be
 26 fair and impartial).
 27
 28

1 3) Plaintiffs' Proposed Addition of Question No. 402 **Plaintiffs' Position:**

3 Plaintiffs submit that the question will allow the parties to assess what, if any,
4 preconceived notions or understanding a prospective juror may have about FDA clearance
5 of a medical device. This question will assist the parties to assess whether a prospective
6 juror has a misunderstanding of the FDA clearance and what it means when a medical
7 device is cleared for the market.

8 **Defendants' Position:**

9 Defendants object to Question No. 40, regarding FDA "clearance". The same
10 information is sought by Question Nos. 38, 39 and 59 (which already asks whether a
11 potential juror has experience with FDA clearance and whether the juror has strong views
12 about the FDA). Hence, the only possible purpose in adding still another question on the
13 topic is to afford Plaintiffs' counsel with additional opportunities to pose argumentative
14 follow-up questions to the panel about the differences between FDA clearance and
15 approval.

16 4) Plaintiffs' Proposed Addition of Question No. 5217 **Plaintiffs' Position:**

18 Plaintiffs submit that the question will enlighten the parties on any preconceived
19 biases or prejudgments a prospective juror has about litigation and lawsuits. It is worded
20 in a neutral manner that does not precondition jurors to a particular result.

21 **Defendants' Position:**

22 Defendants object to Question No. 52. The question seeks the potential jurors'
23 reaction to a vaguely described scenario, without sufficient detail to make any response
24 meaningful. Further, Question No. 52 attempts to identify the potential jurors' attitudes
25 toward litigation, topics already thoroughly explored by Question Nos. 51, 60, 61, and 62.

RESPECTFULLY SUBMITTED this 18th day of July, 2018.

GALLAGHER & KENNEDY, P.A.

SNELL & WILMER L.L.P.

By: /s/ Mark O'Connor

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CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of July, 2018, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing.

/s/ Jessica Gallentine